Filed 3/16/09 Marriage of Sander CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of DENISE M. and DALE A. SANDER.	
DENISE M. SANDER, Appellant, v. DALE A. SANDER, Respondent.	D053005 (Super. Ct. No. D470908)

APPEAL from an order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Denise M. Sander (Denise) appeals from an order terminating spousal support from her former husband Dale A. Sander (Dale). She contends the trial court erred in its interpretation of a certain provision in the parties' martial settlement agreement (MSA) drafted by Denise's attorney, which provided Dale's obligation to pay spousal support

would terminate if Denise was "living with an unrelated adult of the opposite sex for a period in excess of ninety (90) days." The MSA did not define the term "living with."

The record shows the trial court carefully considered the conflicting evidence proffered by the parties regarding the nature of the relationship between Denise and Nathan Courey (Nathan), her former boyfriend. Based on the credibility of that evidence and of the parties themselves, the court ruled Denise had in fact been "living with" Nathan as provided under the MSA, and found she had concealed that fact from Dale. The court thus ruled Denise's right to spousal support under the MSA was terminated, and ordered Denise to repay Dale the spousal support she received from him during the two-year period she and Nathan were living together.

On appeal, Denise does *not* challenge the factual findings of the trial court. Instead, she claims the trial court misinterpreted the term "living together" because at the time of contracting, the mutual intent of the parties was this term included an economic or financial component that was lacking in her relationship with Nathan.

We conclude Denise's undisclosed subjective intent regarding the meaning of the words "living with" is irrelevant to its interpretation. We also conclude this language is not reasonably susceptible to the interpretation urged by Denise. In light of the substantial evidence in the record showing Denise and Nathan shared living accommodations under one roof in a committed, romantic relationship for about two years, we independently conclude Denise was "living with" Nathan, for purposes of the MSA. We thus affirm the order.

BACKGROUND

Denise and Dale were married in August 1988, and separated in November 2001. They had triplets, aged eight at the time of their separation.

A. *Key Provisions of the MSA*

In connection with the parties' marital dissolution, they entered into the MSA effective on December 1, 2001. The MSA, which is 44 pages long, was attached to a judgment of dissolution of marriage entered by the court on July 15, 2002.

Section 22 of the MSA set out Dale's obligation to pay spousal support to Denise. It provides:

"A. Husband [Dale] shall pay to Wife [Denise] for her support and maintenance, the sum of $3,992 per month, commencing December 1, 2001, and payable in advance in installments of $1,996 each on the first and fifteenth day of each month after that.

"B. Husband's obligation to pay spousal support to Wife shall terminate upon the first to occur of the following:

"(1) Husband's death;

"(2) Wife's death;

"(3) Wife's remarriage;

"(4) *Wife's living with an unrelated adult of the opposite sex for a period in excess of ninety (90) days*; or,

"(5) Further court order." (Italics added.)

The MSA also contained an "integration clause," which provided:

"This Agreement and any other instrument(s) executed at the same time as this Agreement contain the final, complete and exclusive agreement of the parties concerning the subject matters covered. It may not be altered, amended or modified except by an instrument in writing executed by both parties. Any previous oral or written agreements between the parties about matters addressed in this Agreement are entirely superseded by this Agreement."

Also relevant here, the MSA provided that California law governs any dispute between the parties arising under the MSA; that before execution of the MSA, each party "had an opportunity to seek independent legal advice concerning his or her rights, duties and obligations, and concerning the legal effects of this Agreement"; that each party "read this Agreement and each of its provisions in full and acknowledges that he or she freely and voluntarily enters into it"; that "Husband [Dale] has elected not to retain counsel to represent him in connection with the negotiation and preparation of this Agreement"; and that each party "[f]ully and completely understands the legal effect of each provision of this Agreement."

At the end of the MSA, Denise's legal counsel certified he:

"[A]dvised and consulted with Wife [Denise] with respect to her rights and obligations and the rights and obligations of Husband and have fully explained to her the legal significance of the Marital Settlement Agreement and the effect that it has upon her rights and obligations; that Wife, after being fully advised by me, acknowledged to me that she fully understood the terms of the Marital Settlement Agreement and its legal effect, and that she was executing the Marital Settlement Agreement freely and

voluntarily; and, that I have no reason to believe that Wife did not understand fully the terms and effects or that she was not freely and voluntarily executing this Agreement. No waiver of the attorney/client privilege of confidentiality is intended by this certification."

B. *Evidence Denise was "Living With" Nathan*[1]

Denise began dating Nathan in February 2004. By summer 2005, Nathan testified he was living with Denise at the Winstanley Way home, the former marital residence of Dale and Denise. Denise and Nathan had a son together, Kaden Courey, who was born in November 2006. Nathan testified he lived with Denise until they broke up in August/September 2007.

In late 2007 Dale filed a motion asking the court to terminate or lower his spousal support obligation to Denise under the MSA, refund support overpayments he paid her while she was living with Nathan, and award Dale sanctions for Denise's failure to inform him that she and Nathan had been living together under one roof for more than two years.

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1 Denise also submitted extensive evidence to show that she and Nathan were not—in her words—"cohabitating," because she claimed Nathan did not live with her on a "full-time basis." She instead described her relationship with Nathan as a dating relationship. However, Denise has not challenged the trial court's express (and implied) factual findings in support of the judgment, which findings are, in any event, supported by substantial evidence in the record. (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874 [if the record contains substantial evidence in support of the judgment, we must affirm even if there is substantial contrary evidence].) Moreover, because "the parties did not request a statement of decision or findings of fact . . . [,] all intendments favor the ruling below . . . [,] and we assume that the trial court made whatever findings are necessary to sustain the judgment. [Citation.]" (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793, superseded by statute on another ground, as noted in *In re Zacharia D.* (1993) 6 Cal.4th 435, 448.)

In support of his motion, Dale proffered substantial evidence to show Denise and Nathan had been "living together" for purposes of the MSA. This evidence included: Nathan's sworn deposition testimony that he lived with Denise from the summer of 2005 through August 2007, and that Denise repeatedly told him the fact they were living together had to be kept from Dale to avoid the termination of her spousal support; the declaration of Dr. Geoffrey Sternlieb, M.D., Nathan's treating psychiatrist, who testified under penalty of perjury that Denise told him when they first spoke in September 2007 that "she had cohabitated with her boyfriend Nathan Courey for over a year and half"; the declaration of Jolene O'Hara, who leased a condominium in Del Mar to "Nathan and Denise Courey" from mid-March 2007 until the lease expired in July 2007; the declaration of Bob Sandler, who rented a condominium located on Dolphin Cove Court, also in Del Mar, to Nathan and Denise; the declaration of Victor Jerome, Denise's neighbor at the Winstanley Way property (until it was sold), who testified he saw Nathan at the home just about every day, nights, weekends, and holidays for about two years; the declaration of Christi Jerome, Victor's wife, who testified that she saw Nathan at the Winstanley Way property on a daily basis, and that both Nathan and Denise told her that Nathan had moved in with Denise; various declarations from friends and relatives of Nathan who testified they visited Nathan at the Winstanley Way property before it was sold, and stayed at the residence during those visits; the declaration of Robert Hopkins, who testified he lived for three or four years in the unit next to the unit Nathan had rented (where Nathan allegedly lived), the first time he met Nathan was late September 2007,

and before their first meeting, he never saw Nathan; and that Nathan added Denise as a domestic partner to his employer's health insurance plan.

Denise also testified that after Kaden was born, Nathan would sleep on average of three nights a week at the Winstanley Way property; that Nathan kept personal items at the residence and had access to the residence; that doctor bills addressed to Nathan for their son Kaden were delivered to the Winstanley Way property; that the lease for the Del Mar property named both her and Nathan as tenants, and that all four children and the dog were listed in that agreement; that she and Nathan went to look at the Dolphin Cove Court property together and originally were both named on the lease, but that she later changed that lease to name only her; and that she and Nathan lived together at the Dolphin Cove Court property, but that it was only "temporary" because Nathan had nowhere else to stay.

C. *Hearing*

At the hearing in January 2008, with Nathan also in attendance, the court stated it had thoroughly reviewed "all of the moving and opposing papers, all of the declarations, all of the documentary exhibits that were lodged by both sides, some . . . more than once" in connection with Dale's motion to decrease or eliminate spousal support to Denise.

The court found Nathan's testimony that he and Denise had been living together beginning in the summer of 2005 more credible than Denise's denials they had not lived together. It also relied on other evidence it found corroborated Nathan's testimony, including the sworn statement from Dr. Sternlieb that Denise told him she and Nathan had been living together.

Regarding the interpretation of the phrase "living with" in the MSA, Denise argued the definition required "both being together *and* [an] economic contribution," with the latter element missing here because, according to Denise, Nathan did not pay "for anything beyond a pizza." (Italics added.) As a result, Denise argued her economic needs remained unchanged even when she and Nathan were together, and thus she and Nathan were not "living together" within the meaning of section 22, subdivision (B)(4) of the MSA.

The court ruled the phrase "living with" was unambiguous, noting that "most people on the streets" would not have a difficult time defining what the term means, "regardless of the motivation for it having been put into the [MSA]." The court also found Denise actively concealed from Dale the fact she had been living with Nathan in order to continue receiving spousal support from Dale, and relied on Family Code section 4334, subdivision (b),[2] in concluding Denise was legally obligated to repay Dale the support she received from him while living with Nathan.

The court next addressed the issue of sanctions under Family Code section 271. The court noted it was "struck" by the sworn testimony of Nathan that "on multiple occasions, he heard [Denise] discourage him from saying anything to [Dale] to [the] effect that they were living together, that he heard her admonish the triplets [the Sanders'

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[2] Subdivision (b) of section 4334 of the Family Code provides: "If the supported party fails to notify the supporting party, or the attorney of record of the supporting party, of the happening of the contingency and continues to accept spousal support payments, the supported party shall refund payments received that accrued after the happening of the contingency, except that the overpayments shall first be applied to spousal support payments that are then in default."

three children] not to say anything to [Dale] that the two of them were living together," and that based on that testimony alone there was "enough evidence before this court to cause the court to conclude that [Denise] engaged in a clandestine plan to keep this information from [Dale]." The court further noted that there was "nothing innocent" it could attribute to Denise on this issue, and that it had "very strong feelings" about Denise's conduct. The court limited the sanction award to $500, however, in order to avoid imposing an "unreasonable financial burden" on Denise.[3] (See Fam. Code, § 271, subd. (a).)

DISCUSSION

A. *Standard of Review*

The trial court ruled the "living with" language in section 22, subdivision (B)(4) of the MSA was unambiguous. We therefore review the interpretation of this provision de novo. (See *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527.)

Moreover, a "trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; see also *Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 625 [determination of ambiguity of a contract is a question of law].)

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3 Denise has not appealed the $500 sanctions award.

B. *Construction of the MSA*

Denise contends the trial court erred when it ruled the "living with" language was unambiguous. She contends the court instead should have considered extrinsic evidence to ascertain the parties' mutual intent regarding its meaning. Because only she proffered such evidence, Denise further contends her interpretation of the meaning of this provision must govern.

Specifically, Denise contends the parties understood at the time of contracting the term "living with" an unrelated male had two components—a living together component, which Denise argued in the trial court meant living together "on a full-time basis," *and* an economic or financial component.[4] As already noted, Denise has not challenged the finding she and Nathan shared living accommodations under one roof, initially with the triplets and eventually also with their own son Kaden. This evidence is based on the testimony of Denise, Nathan, Nathan's doctor, neighbors, family and friends, not to mention documentary evidence including, among other things, the two lease agreements signed by Denise and Nathan in 2007. This collection of evidence provides ample support to satisfy the living together component.

Other than a brief six-week period toward the end of their relationship, Denise argues she was never "living with" Nathan for purposes of the MSA, because he did not

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4 Denise uses the terms "economic" and "financial" interchangeably in her briefs. We need not decide whether in fact these terms are synonymous, in light of our conclusion, *post*, that there is no such component in the "living with" language of the MSA.

"supply [her] a material financial gain or benefit, either through direct exchange of money or in kind services."[5] However, we reject her interpretation of the words "living with" in the MSA.

First, Denise's unexpressed, subjective intent regarding the meaning of the words "living with" is irrelevant to the proper interpretation of this provision. (See *Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133 [absent mistake or fraud, parties' undisclosed intentions are immaterial to interpretation of contract, as it is the "objective manifestations" of intent, as expressed in the contract language, that are controlling]; see also *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980 ["[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of the parties, that controls interpretation" [internal quotations omitted].)

In contrast, Denise's objective manifestations of intent support the interpretation that she and Nathan were in fact living together for purposes of the MSA. The record shows that Denise repeatedly told Nathan and the triplets not to tell Dale that Nathan was living under the same roof with them because she would lose her spousal support from Dale.[6] " 'The fundamental canon of interpreting written instruments is the ascertainment of the intent of the parties. [Citations.] As a rule, the language of an instrument must

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5 The record shows Denise received some financial benefit from Nathan, including being covered under his employer's medical insurance.

6 Denise disputed this evidence. However, she has not challenged the trial court's factual findings on appeal. In addition, the court's finding she concealed from Dale the true nature of her relationship with Nathan, including his living under the same roof with her and the triplets, is supported by substantial evidence. (See *Bowers v. Bernards, supra*, 150 Cal.App.3d at p. 874.)

govern its interpretation if the language is clear and explicit.' " (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670-1671; see also Civ. Code, § 1639 ["When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].)

Second, even if we were to consider Denise's undisclosed, subjective intent regarding the meaning of the words "living with" an unrelated male, we reach the same conclusion because that language is not reasonably susceptible to the interpretation urged by Denise. "When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is reasonably susceptible to the interpretation urged by the party. If it's not, the case is over." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393[internal quotation marks and citations omitted].)

Here, Denise argues the parties, at the time of contracting, intended the words "living with" to include a financial component. However, she provides no additional information regarding how the parties intended such a provision to operate. For example, did they intend any money (or services) contributed by an unrelated male with whom Denise was "living with" in excess of 90 days, to reduce proportionally Dale's support obligation to Denise under the MSA? If so, how would this provision be enforced by Dale, inasmuch as at the same time Denise was arguing a "financial component" was included in the "living with" language, she was denying any obligation under the MSA to disclose such information to Dale.

In addition, section 22, subdivision (B)(4), is self-executing. That is, under this provision if Denise lived with an unrelated male for a period in excess of 90 days (assuming this event was the first of the listed events to occur), Denise's spousal support automatically terminated, and there was no need for Dale to show "changed circumstances" in order to reduce or terminate his support obligation.

However, if, as Denise contends, there was a financial component in the meaning of "living with," this provision would no longer be self-executing. The parties instead would have had to agree on or devise an accounting system to determine the amount of Dale's spousal contribution if and when Denise began receiving a financial contribution in the form of money or services in kind from an unrelated male for a period in excess of 90 days.

Interestingly, when the parties wanted to adjust Dale's spousal support contribution on a going forward basis, they expressly and specifically set out in the MSA the terms of how that would be done. (See, e.g., section 23 of the MSA titled "Automatic Spousal Support Adjustment for Cost of Living," which is a detailed provision governing the adjustment of spousal support payments based on changes in the consumer price index.)

It seems reasonable that if the parties had intended Dale's support obligation to adjust over time in relation to the financial benefit Denise derived from "living with" an unrelated male, they would have specified that in the MSA, would not have made section 22, subdivision (B)(4), self-executing and would have included in the MSA the terms and conditions regarding the adjustment of his support obligation, much the same way they

did in section 23 for an adjustment of spousal support based on inflation. (See *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1478 [parol evidence may not be used to create a contract the parties did not intend to make or to insert language one or both of them now wish had been included]; Code Civ. Proc., § 1856, subd. (a) [a court may not consider extrinsic evidence to vary or contradict the clear and unambiguous terms of a written, fully integrated contract].)

Because the parol evidence rule prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or *add to* the terms of an integrated written instrument (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343), which rule applies to the fully integrated MSA, and because we conclude the meaning of the words "living with" is not reasonably susceptible to the interpretation urged by Denise, we reject her contention that at the time of contracting the parties intended these words to include a financial or economic component. To conclude otherwise would require us to rewrite the provision to confer a benefit not bargained for by Denise. (See *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1128-1129, fn. 12.)

Reviewing the MSA independently, we note from the record that in 2007 Nathan and Denise agreed as a couple to lease two different properties in Del Mar, where they lived with their own son Kaden and the triplets, until they broke up in August/September 2007. The record also shows Nathan spent nearly every day and night with Denise at the Winstanley Way property before it was sold, kept personal items there, had access whenever he wanted to get in to the home and received mail there. In addition, the record contains the statements of disinterested third parties, including Dr. Sternlieb, Nathan's

treating psychiatrist, and neighbors who lived on Winstanley Way near Denise, that Denise admitted to them she and Nathan were living together.

In light of this evidence, we conclude Nathan and Denise shared living accommodations under one roof, in a committed, romantic relationship for a period in excess of 90 days. As such, we further conclude their relationship satisfies the meaning of "living with" under section 22, subdivision (B)(4) of the MSA.[7] (See *In re Marriage of Thweatt* (1979) 96 Cal.App.3d 530, 534 [concluding wife was not "cohabitating" for purposes of former Civil Code section 4801.5, subdivision (a), which is nearly identical to current Family Code section 4323, subdivision (a), when wife shared expenses with two male boarders and there was no evidence of romantic involvement between wife and either man residing in her home, and further concluding that "cohabitation," as opposed to just "living with," requires more of a showing than the supported spouse and the person of the opposite sex "merely sharing living accommodations"].)

C. *Dale's Request for Sanctions on Appeal*

Code of Civil Procedure section 907 states: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any

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[7] In light of our decision, we do not address Denise's "fallback" argument that an ambiguity in language terminating spousal support must be resolved in favor of the right to such support.

reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).)

On this record, we conclude Denise's appeal was not "totally and completely without merit." (*Flaherty, supra*, 31 Cal.3d at p. 650.) We thus deny Dale's request for sanctions under Code of Civil Procedure section 907. (See *id.* at p. 651 [sanctions should be "used most sparingly to deter only the most egregious conduct"].)

DISPOSITION

The order is affirmed. Dale's motion for sanctions is denied, and he is awarded costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

McINTYRE, J.